United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1351

To be argued by
AUDREY STRAUSS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1351

UNITED STATES OF AMERICA,
Appellee,

—v.—

ISAIAH CRUTCH, a/k/a "Alexander Jackson," and
ANNA JEAN GEORGE, a/k/a "Alice Holmes,"
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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UNITED STATES COURT OF APPEALS
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Preliminary Statement

Isaiah Crutch and Anna Jean George appeal from judgments of conviction entered in the United States District Court for the Southern District of New York on October 3, 1975 following a three day trial before the Honorable Milton Pollack, United States District Judge, and a jury.

Indictment 75 Cr. 418, filed April 23, 1975, charged the defendants Crutch and George with one count of conspiracy, four counts of mail fraud, and four counts of use of an assumed name in furtherance of mail fraud, in violation of Title 18, United States Code, Sections 371, 1341 and 1342.

Trial commenced on August 20, 1975 and concluded on August 22, 1975, when the jury returned verdicts of guilty as to both defendants on all nine counts. On October 3, 1975, Judge Pollack sentenced the defendant Crutch to three years imprisonment on each of the nine counts, to run concurrently. On the same date, Judge Pollack sentenced the defendant George to an indeterminate term of imprisonment on each of the nine counts, pursuant to the provisions of the Youth Corrections Act, Title 18, United States Code, Sections 5010(b), 5017(c).

Upon sentencing, Judge Pollack denied Crutch's application for bail pending appeal, and this Court affirmed that ruling on October 7, 1975. Accordingly, the defendant Crutch is presently incarcerated. The defendant George is at liberty pending appeal.

Statement of Facts

The defendants Crutch and George created and executed a mail fraud scheme which defrauded innumerable credit card companies and department stores out of thousands of dollars. Under fictitious names, they obtained credit cards with which they proceeded to charge valuable goods and services. When the bills arrived, the debtors could not be found and, of course, payment was never made.

The Government's Case

In December, 1973, the defendant Crutch, using the name Dean Jackson, rented a small office at 507 Fifth Avenue and, shortly thereafter, installed a telephone answering machine in the office (Tr. 12, 16; GX 10-A). Subsequently, Crutch and George submitted credit card applications to banks, credit card companies and department stores throughout New York under the names "Alex-

ander Jackson" and "Alice Holmes", listing as their employer a company called Data Computer Profile, located at 507 Fifth Avenue. Inquiries by the credit card issuers to the office on Fifth Avenue produced glowing verifications of employment for both Alexander Jackson and Alice Holmes (GX 5-L, 6-B). Credit cards in those names were issued to the defendants by First National City Bank Mastercharge, Chemical Bank Mastercharge, Diners Club, American Express, Lord & Taylor, Macy's, Saks Fifth Avenue and Abraham & Straus, among others (GX 1-A, 3-A, 4, 5-A, 6-A, 7-A, 9-A, 11-A, 13-A).

Crutch and George proceeded to use these credit cards to run up enormous charges. The First National City Bank Mastercharge card was used to purchase goods and services in Montego Bay, Acapulco and Guadalajara (GX 1-B through 1-X). The Chemical Bank Mastercharge was used in Beverly Hills and Los Angeles (GX 11-D). Hundreds of dollars of men's and women's clothing were charged at Lord & Taylor, Macy's, and Abraham & Straus (GX 7-B, 7-C, 7-D, 9-N, 9-C, 9-E, 9-F, 13-B, 13-C). Thousands of dollars of cash advances were obtained by use of the Chemical Bank Mastercharge (GX 11-B through 11-P). The bills were not paid by the fictitious Alexander Jackson and Alice Holmes, nor by their beneficiaries, the defendants Crutch and George.

To prove the defendants' responsibility for this scheme and to link them to the aliases "Alexander Jackson" and "Alice Holmes", the Government produced eye-witness identifications, photographs, evidence obtained from the defendant George's apartment and expert handwriting testimony.

The manager of a car rental firm identified the defendant Crutch as the man who rented a Mercedes-Benz from his company using the name Alexander Jackson and providing information identical to that contained on the fraudulent credit card applications (Tr. 150-59;

GX 8-A, 8-B). When the car was repossessed for non-payment, a briefcase bearing the inscription "Ike Crutch Enterprises" was found in the trunk (Tr. 158; GX 8-C). The defendant George accompanied Crutch to the rental agency (Tr. 279-81).

Two store detectives at Abraham & Straus detained the defendant George in May, 1974, when she attempted to use a credit card in the name of Alice Holmes (Tr. 161-67, 190-93). She cried and protested that she was in fact Alice Holmes (Tr. 166, 193). The defendant Crutch was observed accompanying the defendant George on that occasion (Tr. 189-90).

A Gimbels' security officer testified that he had detained the defendant Crutch on May 30, 1974 when he attempted to charge some men's accessories on a credit card in the name of Shawn Roberts (Tr. 119-21; GX 2-B). After initially insisting that he was Shawn Roberts, Crutch admitted that his true name was Isaiah Crutch and that "he had a scheme where he set up phoney businesses to get credit cards" (Tr. 124-26).

A photograph of Crutch was admitted into evidence taken by Chemical Bank's surveillance cameras on one occasion when Crutch used a credit card in the name of Alexander Jackson to obtain a $400 cash advance (GX 11-P; Tr. 47).

To further establish the defendants' culpability the Government offered evidence seized, pursuant to a search warrant, from the apartment of the defendant George. This included a profile of the non-existent Alice Holmes, listing information virtually identical to that contained in the various credit card applications (GX 14-A); receipts for merchandise in the name Alexander Jackson (GX 17-A, 18-A); receipts in the name Alice Holmes (GX 15-A, 21-A); and blank stationery for "Data Computer Profile," 507 Fifth Avenue (GX 34-A).

Finally, a handwriting expert testified that the defendants filled out and signed the credit card applications and charge slips for the charge accounts of Alexander Jackson and Alice Holmes. Some of the applications and charge slips were filled out and signed by the defendant Crutch; some by the defendant George; and some contained handwriting of both defendants (Tr. 316-75).

Six witnesses authenticated business records or testified to establish each of the specific mailings alleged in the indictment (Tr. 44-52, 56-61, 70-78, 88-91, 96-106, 107-15).

The Defendants' Case

The defendants presented no witnesses.

ARGUMENT

POINT I

There was no error in the trial court's ruling that the search warrant was not based on illegally seized evidence.

Defendants claim that evidence seized pursuant to the warrant authorizing a search of their apartment should have been suppressed because the affidavit which supported the warrant was based on illegally seized evidence. This claim is meritless.

At the pretrial suppression hearing, it was established that F.B.I. Agent Hackbart and Postal Inspectors Macho and Meyers arrived at defendant George's apartment with an arrest warrant to effect her at approxi-

mately 8:45 A.M. on August 29, 1974. Answering the agents' knock, George opened the door wearing only a nightgown. She was immediately placed under arrest, but was permitted to dress in the bathroom in the custody of Postal Inspector Christine Macho.

When the agents entered the apartment, they saw men's clothes strewn on the floor in the living room. In addition, they were aware that George had been associated with defendant Crutch in passing a forged check. Accordingly, Hackbart and Meyers made a cursory search of the premises for the sole purpose of determining if anyone else was in the apartment. They checked the bedroom, the bathroom, the living room, the terrace, and the closets—looking only in those places where a person could hide. They did not open or search through any drawers or cabinets. In opening one of the closets, Agent Hackbart noticed a blank check which fell off the shelf and a commercial check writing machine. Inspector Meyers discovered a Sunoco credit card in the name of James Nobles lying on the television set in the living room (Tr. 86-122). The entire search took only about ten minutes (Tr. 98, 125).

After hearing this testimony, the court ruled that the items seen in the apartment and referred to in the affidavit in support of the search warrant were properly seized and in no way tainted the search warrant, since the items were observed by the agents in plain view while they were lawfully on the premises to arrest defendant George pursuant to a warrant. The court stated:

> "The officers who came to the apartment had an arrest warrant; the officers with a warrant have authority to conduct a cursory search to make sure that there are no other persons present.
>
> This is based on security considerations.

> The search that was conducted here was not a general search in any sense of the word, and the inadvertent discovery of the credit card does not taint the search warrant nor does the inadvertent discovery of the fluttering check or the check machine which was in plain view" (Tr. 131).

The court's factual findings are certainly not clearly erroneous, and its legal conclusions are supported by decisions of this circuit and others. Under the circumstances of the arrest, it was perfectly proper to conduct a cursory examination of the premises to insure that third parties were not present in the apartment who might present a danger to the arresting officers. See *United States* v. *Christophe*, 470 F.2d 865, 869 (2d Cir.), *cert. denied*, 411 U.S. 964 (1972); *United States* v. *Sellers*, 520 F.2d 1281, 1284 (4th Cir. 1975); *United States* v. *Smith*, 515 F.2d 1028, 1031-32 (5th Cir. 1975); *United States* v. *Clemons*, 503 F.2d 486, 488 (8th Cir. 1974); *United States* v. *Blake*, 484 F.2d 50, 57 (8th Cir. 1973), *cert. denied*, 417 U.S. 949 (1974); *United States* v. *Looney*, 481 F.2d 31 (5th Cir.), *cert. denied*, 414 U.S. 1070 (1973); *United States* v. *Miller*, 449 F.2d 974 (D.C. Cir. 1970); *United States* v. *Briddle*, 436 F.2d 4, 7 (8th Cir. 1970), *cert. denied*, 401 U.S. 921 (1971). But see *United States* v. *Cooks*, 493 F.2d 668 (7th Cir. 1974), *cert. denied*, 420 U.S. 996 (1975); *United States* v. *Gamble*, 473 F.2d 1274 (7th Cir. 1973). Moreover, the arresting officers had the right to seize any evidence which was inadvertently discovered in plain view during this lawfully conducted examination for third parties. See *Coolidge* v. *New Hampshire*, 403 U.S. 443, 464-73 (1971); *Harris* v. *United States*, 390 U.S. 234, 236 (1968); *United States* v. *Lisznyai*, 470 F.2d 707 (2d Cir. 1972), *cert. denied*, 410 U.S. 987 (1973); *United States* v. *Candella*, 469 F.2d 173 (2d Cir. 1972);

United States v. *Titus*, 445 F.2d 577 (2d Cir.), *cert. denied*, 404 U.S. 1957 (1971).

Defendants disagree with Judge Pollack's finding that the search was "based on security considerations." In support of their arguments, they attempt to draw different inferences from the proof adduced at the suppression hearing. They claim, for example, that the execution of the arrest warrant for defendant George between 8:30 and 9:00 A.M. was a subterfuge for conducting an otherwise illegal search because they could have "reasonably expected to find the Appellant asleep." (Brief at 6). We submit, however, that Judge Pollack was plainly correct in finding that the agents acted reasonably. It was certainly not improper to assume that George, like most working people, would be up and about by 8:30 to 9:00 A.M. on a weekday.

Equally unconvincing is defendants' claim that the search could not have been based on security considerations, since Agent Hackbart testified that he was not listening for noises in the apartment and the agents also testified that they did not draw their weapons while conducting the search for third parties. What defendants choose to overlook is that there was no need to listen for noises since Agent Hackbart and Inspector Meyers conducted their search immediately upon entering the apartment. Moreover, the necessity of searching with drawn guns is a decision which, we suggest, is best left to the agents. They are in a far better position to balance the degree of force needed to secure their safety against the added risk of unnecessary violence posed by drawn weapons.*

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* In any event, the Supreme Court's decision in *United States* v. *Robinson*, 414 U.S. 218, 236 (1973), suggests that the question of the reasonableness of the agent's actions in conducting the search should not turn on their subjective fears. It is enough that the scope of the search was reasonable and limited to the discovery of third parties.

Finally, defendants' claim for the first time on this appeal that an inconsistency between Agent Hackbart's suppression and trial testimony raises doubts about the purpose and existence of this limited search for third parties. During the suppression hearing and in direct examination at trial, Hackbart stated that the search for third parties began before defendant George started dressing in the bathroom. On cross-examination, he testified that the search for third parties occurred after defendant George was dressed. Defendants claim that this inconsistency demonstrates that the search was not directed at the detection of third parties. This testimony—coming as it did so soon after Hackbart's reaffirmance on his direct examination of the time sequence he testified to at the suppression hearing—was probably no more than an inadvertent slip of the tongue. In any event, after hearing the allegedly inconsistent testimony, the defendants failed to renew at trial their suppression motion or to move to strike the evidence which had been seized. This failure to renew their suppression motion or to move to strike is indicative, we submit, of the immateriality of the inconsistency and, moreover, constitutes a waiver of any objection based on the inconsistency. *Cf.* Fed. R. Evid. 103(a)(1); *Cogen* v. *United States*, 278 U.S. 221, 224 (1929); *Gouled* v. *United States*, 255 U.S. 298, 312-13 (1921); *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (en banc), *cert. denied*, 383 U.S. 907 (1966).*

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* Attacking Agent Hackbart's credibility generally, defendants claim that Hackbart testified at trial that he had not seen any checks in the name of John Schaffner. This, they contended, was inconsistent with Hackbart's testimony that he had called Schaffner on the phone while in the apartment. But Hackbart did not testify that he did not see any checks in the name of John Schaffner. Rather, he testified that he did not see "any other check other than the check that had fallen to the floor." (Tr. 103). Thus, the telephone call to Schaffner was the result of his discovery of the check that had fallen to the floor, and the fact that he did not observe the other checks is irrelevant.

POINT II

The affidavit in support of the warrant did not contain deliberate or material misrepresentations.

The defendants claim that the affidavit sworn to by Special Agent Hackbart and submitted in support of the search warrant was based on three deliberate or material misrepresentations. This contention is without merit.

At the outset it must be noted that the defendants never raised this claim below at any time or in any form whatever. Accordingly, the point has been waived and cannot be considered upon this appeal. *United States* v. *Rollins*, Dkt. No. 74-2610 (2d Cir., Sept. 15, 1975) slip op. 6143, 6153; *United States* v. *Indiviglio*, *supra*, 352 F.2d 276.

However, assuming *arguendo* that the point had been properly preserved, none of alleged inaccuracies constitute either deliberate or material misrepresentations, as they must if the warrant is to be overturned on this ground. *United States* v. *Pond*, Dkt. No. 75-1100 (2d Cir. Aug. 28, 1975), slip op. 5825, 5832; *United States* v. *LaVecchia*, 513 F.2d 1210, 1217-18 (2d Cir. 1975); *United States* v. *Gonzalez*, 488 F.2d 833 (2d Cir. 1973); *United States* v. *Sultan*, 463 F.2d 1066, 1070 (2d Cir. 1972); *United States* v. *Bozza*, 365 F.2d 206, 223-24 (2d Cir. 1966).

First, defendants point to Special Agent Hackbart's statement in the affidavit that the premises to be searched were known to be occupied by Anna Jean Williams [the defendant George] and Isaiah Crutch. At the hearing Agent Hackbart testified that he did not know who lived in the apartment other than the defendant Anna Jean George (Tr. 101). These statements were not in any way contradictory. The affidavit, drawn immediately after the arrest of George, correctly reflected that, upon arresting her, the agents found that the apartment ap-

peared to be occupied by both Crutch and George.* However, as to whether Crutch regularly lived there with Anna Jean George, Hackbart had no knowledge and so testified at the hearing. Thus, as to the first contention, there is no showing of either a negligent or deliberate misrepresentation.

The second alleged misrepresentation is similarly not a misrepresentation at all. The defendants point to the fact that in his affidavit Agent Hackbart attested that he saw "a quantity of blank checks bearing the name of John Schaffner and an address on East 53rd Street . . ." (Aff. ¶ 2). At the hearing Agent Hackbart testified that he saw a blank check fall off the shelf in the closet and that he saw one check when he "first opened the closet door." (Tr. 89, 103). That testimony did not negate his prior affidavit that more than one check was observed, all of which may not have fallen to the floor or may not have been observed immediately upon opening the closet door. Thus, the affidavit and the hearing testimony were not necessarily inconsistent, but to the extent that Agent Hackbart's testimony might have varied to any extent, the differences were surely immaterial. Since the important fact was the discovery of the name John Schaffner and the East 53rd Street address on the check that fell to the floor, the presence of additional checks bearing the same name and address added nothing of importance to the affidavit. Counsel further argue that the East 53rd Street address was found not on the John Schaffner checks as stated in the affidavit, but rather on a white envelope not observed in plain view. In making this claim counsel insinuate that the affidavit was falsified in

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* As Agent Hackbart testified at the trial, during the arrest of George Crutch let himself into the front door of the apartment with a key (Tr. 219).

this regard. In fact the John Schaffner checks each bore the East 53rd Street address and the allegations of any falsification are thus baseless.*

Finally, the last alleged claim of misrepresentation amounts to no more than a minor discrepancy of description. In the affidavit Agent Hackbart attested that there had been positive identifications of both of the defendants at Macy's. At the hearing, Inspector Meyers testified that there was a positive identification of Crutch but a "less than positive" identification of the defendant George at that time. (Tr. 119). Agent Hackbart testified at the hearing that Macy's sale personnel "identified Mr. Crutch and Ms. Williams [the defendant George] as being the individuals who gave them that check." (Tr. 194). Although the affidavit stated that the identification was positive, Inspector Meyer's statement that it was less than positive can hardly be labelled either a deliberate or material misrepresentation by Agent Hackbart. In any event this minor inconsistency could not possibly have had any effect whatever upon the evaluation by the magistrate of the existence of probable cause. *United States Pond, supra; United States* v. *LaVecchia, supra.* As this Court recently noted, affidavits submitted in support of search warrants are not to be scrutinized "with the same microscopic intensity as municipal bond counsel would [read] a bond indenture." *United States* v. *Pond, supra,* slip op. at 5832.

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* The defendants further claim that the John Schaffner checks must necessarily have been recovered at different times merely because they bore non-sequential inventory numbers. This is again mere speculation without a basis in the record or in fact. Indeed, as is reflected on the last page of the inventory for the search, both the defendant Crutch and his attorney, Leonard J. Eisenberg, Esq., were present during the search and could have testified, had they chosen to do so, that these checks were discovered in some way other than precisely as set forth in Agent Hackbart's affidavit. Their decision to forego that opportunity and to rely in this Court merely upon the sequence of numbers on the inventory reveals the weakness of this contention.

POINT III

The magistrate and the trial judge properly found that probable cause was shown for the issuance of a search warrant.

Defendants assert that Agent Hackbart's affidavit submitted in support of the warrant to search defendant George's apartment was insufficient to establish probable cause. This assertion is meritless. The affidavit demonstrated ample probable cause, as both the magistrate and trial judge found.*

In evaluating the probable cause for the search warrant, the defendants would have this Court view each of the items observed in the apartment during the search for third parties separately and in the abstract. By approaching the question of probable cause in this fashion, they are able to ignore the most obvious links between the evidence observed at George's apartment and the crimes specified in the search warrant. Under the circumstances, there could scarcely have been a stronger link between the crime of mail fraud than the Sunoco credit card in the name of James Nobles observed in the apartment. Upon entering the apartment, the agents possessed a warrant for George's arrest for violation of the mail fraud statute in connection with "the submission of phony credit and applications to credit card companies." They knew that George was not "James Nobles" and that "James Nobles" did not occupy her apartment. The inference that this credit card was a part of an illegal scheme was compelling. While defendants appear to argue that the agents lacked *positive proof* that the card was not legitimately in George's possession, they

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* The determination of probable cause by the issuing magistrate is, of course, entitled to "great deference." *Spinelli* v. *United States*, 393 U.S. 410, 419 (1969); *Jones* v. *United States*, 362 U.S. 257, 270-71 (1960).

overlook that the only relevant inquiry is whether there was probable cause to believe the credit card was evidence of a crime.

The discovery of the John Schaffner checks and the check writing machine certainly strengthened the inference that the apartment contained evidence of a mail fraud scheme. A commercial check machine has few legitimate uses in a residential apartment. However, the machine together with blank checks could have obvious utility for one bent on committing frauds. These items could be used to perpetuate credit card fraud by, for example, paying outstanding balances at department stores, thereby gaining time to run up additional bills until the checks bounced. In addition, a commercial check machine could be used together with blank checks to convince unsuspecting dupes of the existence of a fraudulent corporate entity, such as the one created by these defendants to verify employment for the phony "Alice Holmes" and "Alexander Jackson." Also, the blank checks in the name of John Schaffner pointed, under the circumstances, to the existence of another alias under which the defendants were operating their nefarious scheme; for as the evidence at trial indicated, the first step in setting up a credit card fraud is to open a checking account under the alias for which the card is to be obtained.*

Thus, each of the items discovered by the agents contributed to the showing of probable cause, which was clearly established by the totality of the circumstances presented to the magistrate in the affidavit.

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* Defendants argue that the Schaffner checks and the check writing machine had no relevance to a determination of probable cause. In constructing this argument, however, they focus only on whether these items pointed to a theft or possession of stolen goods from a federally insured bank, thereby neglecting the role that these items might play in a mail fraud.

POINT IV

The Government's summation did not deny Crutch and George a fair trial.

As their last point, defendants argue that the prosecutor made an improper remark in summation which deprived them of a fair trial. Specifically, they object to the argument that the effect of a credit card fraud is felt first by the issuers of the cards, but in the last analysis, by "law-abiding citizen, like each of you, who work hard for your money, are forced to pay the price for this kind of fraud and dishonesty." It is argued that the jury was thereby asked to consider themselves as complainants in this case and to constitute themselves as unsworn witnesses. Going farther afield, defendants contend that the quoted remark implied that, if acquitted, the defendants "would run rampant and do further financial damage" (Appellants' Brief at 13). It is further claimed that the prosecution's summation was analogous to appealing to the jury's emotions in a robbery case by arguing that the juror or a member of his family might be the defendant's next victim. These claims, largely contrived, are meritless.

At the outset, it must be noted that, despite the musings of appellate counsel, the summation contained no suggestion whatsoever as to what these defendants would or would not do if acquitted. The remark quoted and assigned as objectionable cannot be fairly said to contain any such suggestion, by inference, implication or otherwise. It is, we submit, indicative of the weakness of defendants' claims of prejudice that they must focus on remarks that were never made or suggested by the prosecutor.

As to the prejudice allegedly engendered by suggesting to the jurors that wage earners would ultimately

pay the price for the type of crime committed in this case, the defendants' claim is far-fetched. It is, we submit, entirely proper for a prosecutor to argue to a jury the Government's view of the significance to society of enforcing particular criminal statutes. *Cf. United States* v. *Wilner*, Dkt. No. 74-1955 (2d Cir., Sept. 10, 1975) slip op. 6109, 6117. In a day and age when corporations possess vast assets and some jurors might well ask if an offense directed at a corporation really caused any significant harm, a simple argument to a jury that the costs of a fraud perpetrated against a credit card company will ultimately be passed on to some degree to consumers is hardly an appeal to the passions of a jury. Moreover, jurors are certainly sophisticated enough to realize that the credit card frauds committed in this case would result in only a *de minimis* cost to the individual consumer. To argue that this passing remark of the prosecutor—occurring as it did during the course of a summation which carefully and dispassionately analyzed the overwhelming evidence of defendants' guilt—suddenly caused the jurors to abandon their dispassionate approach toward the evidence and perceive themselves as victims of the crime, certainly belittles the capacity of jurors.

Defense counsel cite no authority prohibiting remarks such as those to which they object here, and instead rely on cases which are entirely inapposite. In *United States* v. *Schwartz*, 325 F.2d 355 (3rd Cir. 1963), the prosecutor argued to the jury in a tax evasion case that a defense witness should be disbelieved because he was dismissed by the Internal Revenue Service as a result of committing adultery. No more in point is *United States* v. *Bugros*, 304 F.2d 177 (2d Cir. 1962), which involved a summation in which the prosecutor suggested that, because narcotics were found in a child's dresser, the defendant was unconcerned about the safety

of his own children. Neither case constitutes any authority whatsoever for objection to the summation at issue here.*

Furthermore, it ill-behooves the defendants to object to the Government's summation, since the summations of defense counsel exceeded well-established bounds of propriety. Crutch's counsel delivered a summation couched throughout in terms of his personal view of the case, repeatedly placing his own credibility in issue (Tr. 493-507). Moreover he argued inferences to the jury which were not merely unsupported in the record, but were contrary to the unrefuted evidence in the case. For example, he was permitted by the Court, over the Government's objection, to argue that the testimony of the handwriting expert fell entirely if one eye-witness identification were disbelieved, an argument entirely unsupported by any evidence in the case (Tr. 501, 502). He similarly argued that certain credit card charges were paid by the defendants, a disingenuous claim clearly disproved by undisputed documentary evidence (Tr. 503, 504).

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* Our own research has disclosed that there is a line of cases in the Seventh Circuit which disapproves of prosecutors' appeals to jurors' pecuniary interests. See *Epperson* v. *United States*, 490 F.2d 98 (1973); *United States* v. *Trutenko*, 490 F.2d 678 (1973); *United States* v. *Reicin*, 497 F.2d 563, *cert. denied*, 419 U.S. 996 (1974). However, in none of these cases has a conviction ever been reversed as a result of such remarks, and, we respectfully submit, that the remarks disapproved in those cases were not directed at explaining who was harmed by the crime, but at exciting the passions of the jurors.

Also, while in *United States* v. *Lotsch*, 102 F.2d 35 (2d Cir.), *cert. denied*, 307 U.S. 622 (1939), a remark that the proceeds of certain illegal loans ultimately came out of the jurors' pockets was disapproved, the remark in that case was clearly a more personalized appeal to the jurors' pecuniary interest than anything attempted or intended in this case. It is also noteworthy that in *Lotsch* the court declined to reverse the conviction where the evidence clearly demonstrated the defendant's guilt, as we submit is plainly the case here.

The summation delivered by George's attorney likewise included improper, if not outrageous, argument. In discussing the testimony of a Government witness of German origin, Mr. Detloff Vormschlag, defense counsel ridiculed his name deliberately referring to him as "Volkswager." Mr. Laufer's comment was as follows: "In order to attempt to show a knowledge on the part of this young woman, this nurse, they brought in Volkswager, or whatever his name is, Volkslagen." (Tr. 510). Thereafter, defense counsel consistently referred to Mr. Vormschlag as "Volkswager." (Tr. 511, 512). Such conduct, apart from constituting bad taste, was without any legitimate justification and could only serve to inflame the jury against the witness on a wholly improper basis.

Thus, even assuming that the prosecutor's remarks were not proper, as we submit they were, where defense counsel engaged in tactics far more prejudicial and improper than anything of which they complain; * where the defendants were convicted on a record which overwhelmingly demonstrated their guilt; and where no other trial

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* *Cf. Lawn* v. *United States*, 355 U.S. 339, 359-60 n. 15 (1958); *United States* v. *Tramunti*, Dkt. No. 74-1550 (2d Cir. Mar. 7, 1975), slip op. 2107, 2164-65; *United States* v. *Bivona*, 487 F.2d 443, 445-48 (2d Cir. 1973); *United States* v. *Davis*, 487 F.2d 112, 124-25 (5th Cir. 1973), *cert. denied*, 415 U.S. 981 (1974); *United States* v. *Santana*, 485 F.2d 365, 370-71 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974); *United States* v. *Benter*, 457 F.2d 1174, 1176-77 (2d Cir.), *cert. denied*, 409 U.S. 842 (1972); *United States* v. *Hager*, 505 F.2d 737, 740 (8th Cir. 1974); *United States* v. *Mallah*, 503 F.2d 971, 978-79 (2d Cir. 1974); *United States* v. *Greenbank*, 491 F.2d 184, 188 (9th Cir. 1974); *United States* v. *DeAngelis*, 490 F.2d 1004, 1011 (2d Cir.), *cert. denied*, 416 U.S. 956 (1974); *United States* v. *White*, 486 F.2d 204, 205-07 (2d Cir. 1973), *cert. denied*, 415 U.S. 980 (1974); *United States* v. *McCarthy*, 473 F.2d 300, 305 (2d Cir. 1972); *United States* v. *Lipton*, 467 F.2d 1161, 1168-69 (2d Cir. 1972), *cert. denied*, 410 U.S. 927 (1973); *United States* v. *Kravitz*, 281 F.2d 581, 586 (3d Cir. 1960), *cert. denied*, 364 U.S. 941 (1961).

or prosecutorial error is even suggested by the defendants, the singular remark in summation assigned as prejudicial does not require a new trial.

CONCLUSION

The judgments of conviction should be affirmed.

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

AUDREY STRAUSS,
DAVID A. CUTNER,
LAWRENCE B. PEDOWITZ,
Assistant United States Attorneys,
Of Counsel.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

LAWRENCE B. PEDOWITZ, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 29th day of December, 1975, he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Leonard J. Eisenberg &
Ronald E. Guttman, Esqs.
67-40 Myrtle Ave
Glendale, N.Y. 11227

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Lawrence B. Pedowitz

Sworn to before me this
29th day of December, 1975

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-[illegible]75
Qualified in Kings County
Commission Expires March 30, 1977